IN THE

Supreme Court of the United States

October Term, 1948.

No. 406.

UNITED STATES OF AMERICA,
Petitioner,

v.

HARRY S. KNIGHT,
Respondent.

BRIEF FOR RESPONDENT.

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In concluding that the evidence did not support the charges of the indictment, the United States Court of Appeals for the Third Circuit found:

> (1) That the sole obligation of Maxi under the plan of reorganization was to pay $17,000 through its debenture bonds to the creditors of Central Forging and in addition to pay the expenses of administration as allowed by the District Court to an amount not exceeding $26,404.33 (R. 833, 836);
>
> (2) That this obligation was discharged in full by the issuance of the said debenture bonds and the payment of the allowed $23,404.33 of expenses (R. 835, 836); and
>
> (3) That the payment to Michael through Fenner of an additional $3,000 was a purely voluntary payment by Maxi out of its own funds of a sum upon which the estate of Central Forging had no claim (R. 835).

These findings completely refute the basic premise of the indictment that the $3,000 received by Michael in the manner described belonged to the estate of Central Forging (R. 7-15; 835).

In an attempt to circumvent these findings and cure the fatal deficiency in its proofs, the Government's brief (pp. 49-71) contends that under the reorganization Maxi agreed to purchase the accounts receivable and other loose assets of Central Forging for the cash sum of $26,404.33 and in fact paid that price, and that the $3,000 was part of that purchase price and, therefore, formed part of the debtor's estate. These two contentions are predicated upon the oral testimony of the co-defendant, Robert Michael, a discredited and self-confessed perjuror, who was the principal prosecuting witness and whose testimony the Government claims was not accorded the proper weight by the Court of Appeals.

Because these contentions are based upon certain misconceptions of fact and law that the Government has of

necessity urged at every stage of the present cause and reiterates in this Court, this brief will first review the oral and documentary evidence upon which the Court of Appeals relied in necessarily concluding that the charges of the indictment had not been sustained and then answer the several misconceptions in their respective order.

I. COUNTER-STATEMENT OF THE CASE.

The first count of the indictment charges that respondent and the co-defendants George L. Fenner, Homer N. Davis and Donald M. Johnson, aided and abetted the embezzlement by Robert Michael, successor trustee, of $3,000 in money belonging to Central Forging, a debtor in reorganization (R. 7-10). The second count charges them with aiding and abetting a fraudulent transfer by said successor trustee of accounts receivable having an approximate value of $3,000 and belonging to said debtor's estate (R. 10-12). The third count charges them with being co-conspirators to said embezzlement and fraudulent transfer (R. 13-15).

Central Forging, a Pennsylvania corporation, was engaged in manufacturing valves at Catawissa, in the Middle District of Pennsylvania (R. 41). In July 1938 a bill was filed against it in the Common Pleas Court of Columbia County and a receiver in equity appointed (R. 395-96).

On August 5, 1938, a creditors' petition for reorganization under Section 77B of the Bankruptcy Act (11 U. S. C. 207) was filed. An answer was submitted questioning the good faith of the petition. From an order approving the creditor's petition as properly filed, the State court receiver and two creditors appealed.

Respondent, as counsel for creditors and bondholders of Central Forging, then came into the reorganization proceedings for the first time, prepared the paper book and argued the case before the Court of Appeals, which affirmed the order (R. 396-98). See *Snyder v. Fenner*, 101 F. (2d)

736 (1939). The District Court was directed to appoint a trustee to take charge of the debtor corporation.

The Court appointed Walter Compton as trustee and Clair Groover, Esquire, as his attorney (R. 400). Considerable litigation resulted throughout the proceedings, in all of which respondent took the laboring oar representing creditors and bondholders. His professional services are fully set forth in his petition for allowances offered in this case (R. 395-98).

Defendant Fenner, who was general counsel for Maxi, took little part professionally in the reorganization proceedings (R. 607).

Compton, as trustee, operated the plant until December 31, 1941. During his administration several efforts were made to have Maxi take over Central Forging on the basis of an exchange of Maxi's stock for claims of creditors. Such a plan of reorganization under Chapter X was filed in the middle of 1941 but was rejected by the bondholders (R. 39; 188; 403-05).

Upon his appointment as referee in bankruptcy, effective January 1, 1942, Compton resigned as trustee. On December 27, 1941, Robert Michael was appointed the successor trustee, and J. Donald Reifsnyder as his attorney (R. 31-36). Reifsnyder was named in the indictment as a confederate but was not living when it was submitted.

On January 23, 1942, respondent met Michael and Reifsnyder for the first time when they called at his office to discuss a new plan for the liquidation of Central Forging by a private sale in bankruptcy of its property to Maxi on a cash basis. He stated he saw no reason why such a plan could not be worked out. He agreed to consult with his client and draft a proposal (R. 39-40; 404-07).

Following a consultation with officials of Maxi, respondent wrote a letter, dated January 29, 1942, to Reifsnyder proposing that (1) Maxi pay $17,000. in cash for the land, plant and fixed assets of Central Forging and waive its claim upon the $21,300. of Central Forging bonds it

held, (2) the plant be kept in operation and any inventory on hand at settlement be taken over at cost by Maxi, (3) unused supplies at settlement be included in the sale price of $17,000., and not considered a part of the loose assets, and (4) the current loose assets be liquidated for the payment of expenses. The letter stated that the procedure to accomplish this proposal should be a prompt adjudication of bankruptcy against Central Forging, to be followed by a private sale approved by secured and unsecured creditors (R. 40-46; 408-13, 850-52).

It was calculated that under the foregoing proposition there would be sufficient funds to pay (a) a dividend of 20% to bondholders other than Maxi, (b) a dividend of 5% to 8% to unsecured creditors, and (c) all expenses (R. 44; 410-11).

On February 13, 1942, Michael and Reifsnyder again called at respondent's office and stated that it was wholly impractical for the trustee to liquidate the assets of Central Forging and yet keep its business as a going concern (R. 450-51). They inquired whether the original plan for a liquidation sale in bankruptcy could be changed into one of reorganization by merger under Chapter X (R. 450-51). Respondent concluded that a reorganization by merger, as distinguished from a sale, could be effected without an adjudication of bankruptcy(R. 451-52).

Their conversation resulted in the following plan of reorganization, which respondent submitted to Maxi by letter dated February 17, 1942: (1) Maxi should take over Central Forging for a price of $17,000., plus the inventory, except the item of $5,054.21 of supplies which was to be omitted from the inventory and for which Maxi was to pay $2,000., (2) the take-over should be as of January 1, 1942, and (3) Maxi should receive the profits and bear any losses between January 1, 1942 and the closing date (R. 419-29; 452).

On February 16, 1942, Reifsnyder telephoned respondent that he and Michael had gone to Harrisburg to meet a committee of bondholders who had agreed with the pro-

posed plan, and that he was preparing a skeleton of it (R. 420). On February 17, Reifsnyder wrote respondent, enclosing a draft of the proposed plan (R. 426-29). However, the draft contained nothing about Maxi taking over the assets of Central Forging as of January 1, 1942 (430-31a).

Respondent redrafted the plan and sent his redraft to Reifsnyder in a letter, dated February 23, 1942 and setting forth his corrections and additions. His redraft outlined respondent's different understanding of the transaction, namely, that the transfer of the assets was to be as of January 1, 1942, and that all the property, together with all accretions to the date of actual transfer, were to become vested in Maxi (R. 431; 436-42).

Very shortly after he had received respondent's letter of February 23, 1942, Reifsnyder telephoned that he approved of most of respondent's suggestions and corrections, but could not go along with the insertion of January 1, 1942, as the transfer date (R. 443). He stated that a transfer as of that date was not practical and would get them into a lot of trouble because inventory and accounts would change between January 1, 1942 and settlement and might be more or less (R. 443-44).

When respondent asked if all was off, Reifsnyder replied that the other minor changes would be made, that they would arrange for Maxi to get everything when the transfer was made, as had been understood, and that they wanted him to stand by them and pay the administration costs up to or equal to the amount they had talked about (R. 444).

Respondent thereupon agreed that Maxi would pay the costs of the proceeding so long as they did not exceed $26,432.33, adding that if they were less Maxi was to pay them, but if they were more Maxi had the option of taking or leaving it. To this Reifsnyder agreed and said he would have the plan printed and filed (R. 444-45; 505-06).

The redrafted plan, as thus modified, was filed on February 27, 1942, as "Proposal of Revised Plan of Reorgani-

zation." It was identical in form and substance with the redraft submitted by respondent to Reifsnyder on February 23, 1942, save and except there was omitted from paragraph five,[1] which provided for the merger with Maxi, (a) the vesting date "as of January 1, 1942", and (b) the provision "together with all accretions to said property

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1. Paragraph 5 of the PLAN, as drafted and submitted by respondent on February 23, read as follows:

> "5. MERGER WITH MAXI MANUFACTURING COMPANY, a corporation organized and doing business under the laws of Pennsylvania, is contemplated herein. All of the assets, claims, patents, rights, franchises, cash, receivables and property of every kind, nature and description . . . are by proper instrument . . . to be transferred to and title and ownership thereof shall become vested in the Maxi Manufacturing Company, its successors and assigns, as a going concern *as of January 1, 1942*, free, clear and divested of all liens, encumbrances and claims of every kind and character, *together with all accretions to said property between January 1, 1942 and date of actual transfer—all to be done* upon the acceptance of this plan pursuant to law and compliance with the provisions thereof." (Emphasis supplied.)

After the telephone conversation on the next day by Reifsnyder to respondent, this paragraph was changed by Reifsnyder by leaving out the emphasized words alone, so that the paragraph read as follows:

> "5. MERGER WITH MAXI MANUFACTURING COMPANY, a corporation organized and doing business under the laws of Pennsylvania, is contemplated herein. All of the assets, claims, patents, rights, franchises, cash, receivables and property of every kind, nature and description . . . are by proper instrument . . . to be transferred to and title and ownership thereof shall become vested in the Maxi Manufacturing Company, its successors and assigns, as a going concern, free, clear, and divested of all liens, encumbrances and claims of every kind and character, upon the acceptance of this plan pursuant to law and compliance with the provisions thereof."

between January 1, 1942, and date of actual transfer—all to be done", both of which respondent had inserted in his redraft (R. 61-66; 445-49).

The revised plan of reorganization provided that in pursuance of Chapter X of the Bankruptcy Act, Central Forging should merge with and transfer all property of every kind and character to Maxi. It contained no promises other than (a) that bondholders were to receive 20% of their allowed claims, and common creditors 5%, and (b) that all fees, costs and expenses of the receivership and the reorganization proceedings, as allowed by the District Court, were to be paid in cash by the trustee. It further provided that the consummation of the plan would constitute a settlement and discontinuance of all actions or right of actions against the debtor. It declared that stockholders had no right of participation in this or any other plan, because they had no equity (R. 61-66). Although the plan did not specify the source from which the trustee was to obtain the necessary cash, yet it was understood by everyone that Maxi would furnish cash not exceeding $26,404.33 (R. 182, 196-97; 444-45; 505-06). In fixing this postulatory limitation, the amount of net current assets, as shown by the December 31, 1941 report of Dobson, was selected as a yardstick (R. 196-97; 199).

On February 27, 1942 the District Court ordered that the revised plan of reorganization be made available for inspection and set March 16, 1942 as the day for hearing objections thereto. No objections were filed. Thereupon the Judge entered an order approving the plan, directing a copy of the plan and a copy of the summary be sent to each creditor, and fixing April 1 as the last day for accepting the plan in writing (R. 452-53). This was the only plan submitted to the creditors (R. 191-92).

On April 2, 1942, Special Master Crolly counted the votes. On April 7, 1942, he filed his report showing that the vote to approve the plan was almost unanimous (R. 453). He advised respondent of the result of the voting before it was officially reported (R. 453).

On April 8, 1942, Michael and Reifsnyder called upon respondent at his Sunbury office. Reifsnyder stated that he had been present at a meeting in the office of Special Master Crolly at which fees were generally talked over; that from that conversation and other information he had he knew that fees, costs and allowances would be, as near as he could calculate, about $3,000. less than the maximum which Maxi had agreed to pay; and that Michael and he would have to take less money for their fees than they had expected to receive (R. 462-63; 563-64; 861).

Reifsnyder then made the plea that Michael and he had successfully carried out the reorganization of the debtor to the satisfaction of all interested parties; that they had calculated on each receiving a fee of $7500., but would not be getting as near that amount as they had anticipated; that Reifsnyder had applied for a commission, might be called at any time, and was anxious to provide for his family before leaving; that Michael was also of war age and might be called; that they had brought the reorganization proceeding to a rapid conclusion; and that Maxi would promptly get the plant which it needed in its war work. They suggested that Maxi should be willing to pay them the $3,000. it was saving through the reduction in costs below the agreed maximum (R. 463-66; 563-64).

Respondent answered that his client was liable to pay only the costs as allowed and was obliged to pay the maximum amount only if the allowed costs ran up to that amount. They agreed this was true, adding that if the costs had gone up to the maximum Maxi would have paid them, and that, therefore, they should be given the extra money that Maxi was saving (R. 465).

Their argument was so very effective that respondent called Maxi. Defendant Davis answered the telephone. Respondent repeated to him what Reifsnyder and Michael had said and advised that although Maxi did not have to pay any more than the costs allowed by the court, yet, if it felt that a good job had been done by these young men,

it could give them the $3,000. saved in costs out of its own free funds. He explained that the payment would be voluntary and not in pursuance of any promise or obligation which Maxi had. Davis replied that he thought it would be all right and that respondent should go ahead with it unless he heard from Maxi to the contrary (R. 466-68; 569).

Reifsnyder later that evening suggested that he could have the accounts receivable reduced and get the $3,000. that way. Respondent replied that there was no necessity, in his opinion, for making a reduction in anything. He called their attention to the fact that they had refused to agree to have the transfer date back to January 1, 1942, because of the ensuing changes in accounts receivable and inventory; that, in lieu thereof, they had fixed a maximum amount of costs; and that, consequently, a change in the accounts receivable would be immaterial. He said, however, that a reduction in the accounts receivable could easily be made because of the costs incident to collecting some of them. Reifsnyder seemed to take that cue (R. 470-71).

Respondent stated he would do what he could to get the $3,000. for Reifsnyder and Michael because he felt that would be all right. As he was then preparing to leave his office for several days, respondent suggested that Reifsnyder write a letter of explanation. Reifsnyder did this under date of April 9, 1942. Before leaving that day, respondent wrote Davis about Reifsnyder's suggestion of a reduction in the accounts receivable and asked Davis to explain it to defendant Fenner (R. 471; 702-04).

On April 14, Reifsnyder as attorney for Michael signed and filed a "Report of Successor Trustee", the figures of which were "taken from reports audited by Dobson." The report showed a balance of $22,892.83 available for expenses and allowances (R. 90-92). Respondent did not see the Report until three months later (R. 493). He had nothing to do with its preparation (R. 493) and had no reason to expect such a report would be filed, as Chapter X did not require it (R. 542). On April 20, 1942, the court handed

down an "Order on Fees and Allowances Requested in Confirmation of the Revised Plan of Reorganization", which Order awarded the aforesaid balance for expenses and allowances (R. 92-97).

On April 24, 1942, checks totalling $22,982.83 were drawn by the Secretary-Treasurer of Maxi, as directed by the parties in interest, in full compliance with the Order of Confirmation of April 17, 1942, and the Order on Fees and Allowances of April 20, 1942. The final papers under the reorganization were signed and delivered to Maxi. The Bill of Sale showed no accounts receivable transferred to Maxi (R. 490). Nor was any mention made of them at settlement (R. 490-91). Maxi also drew a check for $3,000. to the order of defendant Fenner, as an intermediary, the proceeds of which were turned over to Michael and Reifsnyder, less $500. reserved by Fenner for income tax purposes (R. 99-112; 479-92).

On July 9, 1943, the trustee filed what is designated as the "First and Final Account of Robert Michael, Successor Trustee" (Gov't Ex. G-1-I; not printed in Appendix). Respondent had nothing to do with the preparation of this Account and never saw it until just before the trial of the present case in October 1945 (R. 493).

In 1944 a grand jury investigation was ordered of "certain matters" in the United States Court for this District. During the course of the investigation, Michael, successor trustee, appeared before the grand jury and swore that he received no money other than his fees, as allowed by the court. He further swore that he did not receive $3,000. from Maxi in addition to his allowed fees.

Respondent, Fenner, Davis and Reifsnyder were also called before the grand jury. They swore that Michael did receive the $3,000. As the result of their testimony Michael was charged with contempt of court before the grand jury (R. 264).

At the trial of the contempt proceedings in September 1944, respondent, Fenner and Davis were called to testify

on behalf of the Government. Each testified to the payment by Maxi of $3,000. from its own free funds to Michael individually on April 24, 1942. Upon this testimony the court found Michael guilty as a contumacious witness, found that his testimony was perjurious, and sentenced him to six months in the county jail (R. 158; 264).

After serving eleven days, Michael was released (R. 158) on an appeal to the Court of Appeals for the Third Circuit which affirmed the decision of the District Court (*In Re Michael*, 146 F. (2d) 627, 1944). A certiorari was granted by this Court and was pending decision at the time he testified in the instant case. This Court reversed his conviction (*In Re Michael*, 326 U. S. 224, 1945).

Prior to the decision of this Court, Michael was indicted for embezzlement and falsification of records as trustee. He pleaded guilty only to the count charging falsification of the records. Sentence was deferred (R. 157-58). Thereupon, he again appeared before the same grand jury, who found the present indictment on April 20, 1945 (R. 158; 261-63).

On October 16, 1945, all of the defendants were called to trial before Judge William F. Smith, Specially Presiding, and pleaded not guilty, except Michael who previously had pleaded guilty generally to the indictment. Sentence against him was again deferred. He appeared as the Government's chief witness (R. 23-388).

The jury found respondent and Fenner guilty and Johnson and Davis not guilty. Motions in arrest of judgment and for a new trial were duly filed. Both Motions were denied by Judge J. Cullen Ganey (R. 2-4; 869-26).

Respondent was thereafter sentenced to pay a fine of $1,000. Sentence on Michael was suspended. On appeal to the Court of Appeals for the Third Circuit, the conviction of respondent was set aside and the entry of a judgment of acquittal was directed to be entered (*169 F. (2d) 1001, 1948*). A certiorari was granted on January 3, 1949 (R. 870).

II. ARGUMENT.

The contention that the reversal of respondent's conviction has not only resulted in a miscarriage of justice, but also established a harmful bankruptcy precedent, is based upon three misconceptions of fact and law that permeate every argument advanced in petitioner's brief. These misconceptions are:

1. That the purpose of the alleged embezzlement was to provide funds to pay for the appointments of the successor trustee and his attorney;

2. That Maxi agreed to pay $26,404.33 for the accounts receivable and other loose assets of Central Forging; and

3. That the $3,000 paid Michael was part of the purchase price and, therefore, belonged to the estate of Central Forging.

From these primary misconceptions emanate the equally unsound secondary contentions of petitioner:

4. That the $3,000 payment decreased the funds available for creditors;

5. That respondent's explanation of the $3,000 payment was incredible; and

6. That the decision of the Court of Appeals establishes an easy means of embezzling from a debtor's estate in reorganization.

The foregoing misconceptions and fallacious contentions will be considered and answered in their respective order.

A. Petitioner's Primary Misconceptions of Fact and Law.

1. *The jury rejected the Government's theory that the successor trustee and his attorney embezzled property from the estate of the debtor, Central Forging, in order to pay the acquitted Donald Johnson for their appointments.*

The Government's brief states that Donald Johnson suggested that Michael and Reifsnyder should apply for appointments to his father, then a judge of the District Court, which they did (pages 4-6); and that subsequently, in consideration of the appointments, they, with the knowledge and approval of Donald Johnson, evolved the plan of taking care of the latter out of certain funds to be diverted from the estate (page 10-11). For the first time the Government in its brief omits all reference to the testimony of Michael that they eventually delivered to Donald Johnson $2,500 therefrom in cash. This was the basic theory of the prosecution and was predicated entirely upon the uncorroborated testimony (R. 27-35, 57-58, 147-148) of the discredited Michael, a self-confessed perjurer who pleaded guilty and was the Government's principal witness (R. 154-158, 202-208, 232-254, 262-264).

However, on cross-examination Michael was forced to admit that he had never told respondent of the professed deal with Donald Johnson (R. 213-220, 269, 274-284). Both respondent and co-defendant Reimer denied knowledge of it (R. 469, 523, 601-604).

Certainly, this undisclosed and unbelieved motive or theory can have no present probative value with regard to the innocence or guilt of respondent. As Circuit Judge Maris aptly observed (R. 832):

> "* * * The Jury, however, acquitted Johnson and the Government's theory as to the purpose of the transaction involving the $3,000 and the receipt of the money by Johnson, therefore, falls out of the case . . ."

At the oral argument Government counsel frankly conceded that by reason of his acquittal the Donald Johnson episode must no longer be considered (Certified Transcript, pages 67-68). It is indeed surprising that the petitioner's brief should only partially resurrect this rejected motive or theory and through ignoring Michael's testimony that the $2,500 was actually paid to Donald Johnson (R. 112-121, 141-149) should foster the erroneous impression that Michael personally benefited from that payment.

2. *Maxi did not agree to pay $26,404.33 for the accounts receivable and other loose assets of Central Forging.*

The brief for petitioner contends that under the "revised plan of reorganization" Maxi was to pay Central Forging the value of its net current assets; that on April 8, 1942 Michael, Reifsnyder and respondent finally agreed upon the total figure of $26,404.33 as the value of such assets; and that this sum was so paid and distributed at settlement (pages 50-58).

This fallacious contention is completely refuted by the documentary and oral proofs, which establish conclusively that Maxi never offered to buy or obligated itself to buy the accounts receivable and other loose assets of Central Forging for the sum of $26,404.33 or any other cash sum, and that the sole obligation of Maxi under the agreement between the parties as well as under the approved plan of reorganization was to pay $17,000 in debenture bonds to creditors in compromise of their claims, and in addition to pay the expenses of the receivership and reorganization proceedings, as allowed by the District Court, to an amount not exceeding $26,404.33.

The first offer by Maxi to take over Central Forging is embodied in the January 29, 1942 letter from respondent to Reifsnyder (R. 42-46, 409-13, 696-700). It proposed that Maxi pay $17,000 in cash for a clear and unencumbered title to the land, plant, machinery and equipment, and all

assets of every kind and character "except accounts receivable, cash, goods in process, goods finished and raw material." It further proposed that the plant be kept in operation until taken over by the purchaser, and that at the same time the current assets be liquidated for the payment of expenses. It was calculated that the purchase price of $17,000 would be sufficient to pay a dividend of 20% to bondholders, provided Maxi waived its right to participate as a secured creditor holding $21,300 of Central Forging bonds, and a dividend of 5 to 8% to unsecured creditors, and that the proceeds from the liquidation of the current assets would be more than sufficient to pay all expenses.

The January 29, 1942 offer by Maxi was not accepted by Michael and Reifsnyder because it was wholly impracticable for the trustee to liquidate the assets of Central Forging and yet keep the plant in operation until the take-over (R. 450-451). In lieu thereof, Reifsnyder, by letter dated February 17, 1942 (R. 426-429, 715-718) forwarded a plan of reorganization which provided for the merger of Central Forging with Maxi in pursuance of Chapter X of the Bankruptcy Act (R. 426-429, 715-718). The respondent in turn by letter dated February 17, 1942 (R. 419-423) notified his client of the change in the reorganization plan from a sale to a merger. The petitioner's brief (pages 11-12) misconstrues these two letters and contends that they merely enlarged the January 29, 1942 offer so as to include an offer by Maxi to buy the net current assets in addition to the fixed assets. This misconstruction is refuted by the final revised plan of reorganization by merger that was filed with the court on February 27, 1942.

Respondent redrafted the February 17, 1942 plan to provide that the transfer of assets was to be as of January 1, 1942, and forwarded his redraft to Reifsnyder by letter dated February 23, 1942 and setting forth the changes (R. 431, 436-442, 719-724). Reifsnyder approved the changes save the insertion of January 1, 1942 as the transfer date, which date he rejected as troublous and not practical (R.

443-444). The plan provided that the trustee should pay in full in cash all costs, fees and expenses of the receivership and the reorganization proceedings. Inasmuch as Maxi was to receive everything when the transfer was made, Reifsnyder asked Maxi to pay these costs, fees and expenses so long as they did not exceed $26,404.33 (R. 444-445, 505-506).

The final plan was filed on February 27, 1942 as "proposal of revised plan of reorganization" (R. 61-66, 704-708). It was identical in form and substance with the redraft submitted by respondent to Reifsnyder on February 23, 1942 except for the omission of January 1, 1942 as the transfer date (R. 61-66, 436-442, 704-708, 719-724).

Paragraph 5 of the revised plan of reorganization provided that in pursuance of Chapter X of the Bankruptcy Act Central Forging should merge with Maxi and that all assets should be transferred upon acceptance of the plan "pursuant to law and compliance with the provisions thereof" (R. 61-66, 704-708). Paragraphs 6 and 7 imposed the sole obligation on Maxi to issue general debenture bonds to secured creditors of Central Forging, i. e., bondholders, in the amount of 20% of their holdings, and general debenture bonds to unsecured creditors in the amount of 5% of their allowed claims (R. 64, 707). The trustee under paragraphs 9 and 10 was required to pay in full in cash the costs, fees and expenses of the receivership and the reorganization proceedings (R. 65, 707-708).

The final order of confirmation of the revised plan of reorganization specified that the general debenture bonds of Maxi were to be turned over to the trustee and by him delivered to the secured and unsecured creditors of Central Forging, and that upon the receipt by the trustee of said bonds and upon payment of all administration costs and expenses, as allowed by the court (i. e. $23,404.33) the trustee should transfer to Maxi all the assets, claims, patents, right, franchises, cash, receivables and property of Central Forging (R. 689).

In directing that payment of all administration costs, fees and expenses was a condition precedent to the merger, the court order, unlike the reorganization plan, did not specify by whom they were to be paid. Consequently, they could be paid either by the trustee out of the assets of Central Forging before the transfer as contemplated by the reorganization plan, or by Maxi with its own funds in accordance with the oral arrangement with Reifsnyder (R. 444-445, 505-506), in which event Maxi would receive all the assets of Central Forging.

That Michael and Reifsnyder fully understood that the payment by Maxi of $23,404.33 at settlement was solely for the purpose of taking care of the administration costs, fees and expenses and was not in payment for the accounts receivable and other loose assets is evidenced by the testimony of Michael on cross-examination, the uncontradicted testimony of respondent on direct and cross-examination, and the method of payment.

Michael stated on cross-examination that under the final agreement between himself, Reifsnyder and respondent, Maxi was to pay $17,000 in debenture bonds to take care of bondholders and creditors and the cash sum of $25,892 (reduced by previous payments to the final sum of $23,404.33) for costs of administration (R. 182, 196-197). This testimony contradicted his direct testimony that Maxi was obligated to purchase the current assets of Central Forging for an undetermined cash sum that was not finally fixed until the April 8, 1942 conference (R. 68-71). It is upon this contradictory and contradicted direct oral testimony of Michael that the Government mainly bases its erroneous contention that Maxi agreed to pay $26,404.33 for Central Forging's current assets.

Respondent on direct and cross-examination testified that the cash sum paid by Maxi at settlement was solely to take care of administration costs, fees, and expenses and was not in payment for the accounts receivable and other loose assets of Central Forging (R. 430-444, 449-452, 490-

491, 495-501, 505-506). The several checks drawn by Maxi and delivered at settlement were payable to the persons named and in the amounts specified in the court order on fees and allowances filed April 20, 1942 (R. 690-696).

It thus appears that at no time in the negotiations was it ever contemplated that Maxi should purchase the accounts receivable and other loose assets for $26,404.33 or any other cash sum. At the very outset, the initial proposal of January 29, 1942 called for a trustee's sale of only Central Forging's fixed assets to Maxi for $17,000 in cash. The accounts receivable and other loose assets were expressly excluded and were to be liquidated to provide the necessary funds for the payment of administration costs and expenses (R. 42-46, 409-413, 696-700). This proposal was discarded as impracticable.

The final, revised plan of reorganization, which was filed February 27, 1942 (R. 61-66, 704-708) and was confirmed April 17, 1942 (R. 687-690), provided for the merger of Central Forging with Maxi in pursuance of Chapter X of the Bankruptcy Act. The sole obligation of Maxi under the reorganization was to issue debenture bonds in the amount of $17,000 to secured and unsecured creditors of Central Forging in compromise of their claims.

The trustee was required to pay administration costs, fees and expenses as a condition precedent to the merger and transfer of assets. In discharge of that duty and in order to avoid the troublesome problem of liquidation during plant operation, the trustee orally arranged with respondent that Maxi would pay the administration costs, fees and expenses with its own moneys and thereupon receive all the assets of Central Forging without deduction.

The foregoing documentary and oral evidence is reviewed at length in the printed majority opinion (R. 829-34) and led Circuit Judge Maris to the necessary conclusion that the sole agreement of Maxi was to pay $17,000 in debenture bonds to creditors in compromise of their claims and in addition to pay receivership and reorganization

expenses "as allowed by the District Court, to an amount not exceeding $26,404.33" (R. 832-836). Circuit Judge Maris further found that this agreement was reached and approved by the court and the creditors before Michael and Reifsnyder ever broached to respondent their April 8, 1942 request that Maxi pay them $3,000 in addition to their fees as allowed by the District Court (R. 833, 835).

The following quotations from the majority opinion epitomize these incontrovertible findings and conclusions (R. 833,835):

"* * * The evidence, however, leaves no escape from the conclusion that the sum of $26,404.33 thus agreed to be paid was to be used only for the payment of expenses as allowed by the District Court and that neither the creditors nor stockholders of the Forging Company had any interest in or claim upon that sum. The necessary conclusion, therefore, is that the Maxi Company's obligation under the plan was to pay $17,000 through its debenture bonds to the Forging Company's creditors and in addition to pay the expenses of the receivership and reorganization proceedings, as allowed by the District Court, to an amount not exceeding $26,404.33.

* * *

"* * * For on April 8th, when the scheme to obtain the $3,000 was devised, the plan of reorganization had already been approved by the court and the creditors. The rights of the parties in interest in the estate of the Forging Company had thereby become fixed and established. Under the plan of reorganization, as we have said, the sole rights of the creditors were to receive the debenture bonds which the Maxi Company issued and which were delivered to them. The stockholders had no rights whatever. The Maxi Company was entitled to all of the assets of the Forging Company and its only obligation was to pay the

expenses as allowed by the court. This obligation it fulfilled to the letter."

As a corollary to its erroneous contention that Maxi agreed to pay $26,404.33 for the accounts receivable and other loose assets of Central Forging, the Government's brief urges (pages 59-60, 64-65, 67-68) that the $3,000 paid Michael individually was "*in fact*" part of "the money being paid for the bankrupt's assets" and, therefore, was trust property within the purview of Section 29a. This corollary, like the major premise upon which it is based, partakes of the same fallacy, namely that the $3,000 formed a part of the agreed consideration for the assets of Central Forging. The numerous cases cited in the Government's brief are inapplicable to the facts of the present case, because the $3,000 did not "*in fact*" constitute any part of the agreed consideration for the take-over of Central Forging by Maxi under the reorganization plan.

The Government in its brief complains that the Court of Appeals did not accord the proper weight to its evidence (page 4), accepted the defense's version of the facts and disregarded the Government's evidence (page 31), and by so doing departed from the limits of appellate review (page 74). This criticism is not justified. The majority opinion is largely based upon uncontradicted documentary evidence, a great part of which was offered as part of the Government's case. To the extent that this documentary evidence was supplemented by corroborative oral testimony by the Government, such testimony was accepted by the Court of Appeals. When, however, the Government's oral testimony contradicted the documentary evidence, e. g., Michael's testimony that Maxi agreed to pay $26,404.33 for the accounts receivable and other loose assets of Central Forging, or when the Government's testimony conflicted with credible defense testimony, e. g., Michael testified that the $3,000 was to provide funds for a corrupt payment to Donald Johnson, whereas the respondent testified it was a voluntary gift by Maxi to Reifsnyder and Michael, the

Court of Appeals refused to accept the contradictory or contradicted oral testimony of Michael and accepted the documentary or defense version thereof, particularly since Michael was a discredited perjurer and since the acquittal of Donald Johnson had eliminated the basic theory of the prosecution that the purpose of the $3,000 payment was corrupt, and also revealed the jury's disbelief in the trustworthiness of Michael's testimony (R. 832).

The Government in its brief (pages 39-43) asserts that the respondent's testimony in the prior contempt proceeding is contradictory of his testimony in the present case that Maxi was merely obligated to pay the administrative costs, not exceeding $26,404.33. Excerpts from his earlier testimony are quoted "as further proof of the falsity of his testimony in the present case" (pages 40-43). The quoted excerpts relate mainly to the request by Reifsnyder that the $3,000 be paid by a separate check and the respondent's acquiescence therein, provided Maxi paid no more money than the original agreed amount.

A review of the respondent's prior testimony in the contempt proceedings (R. 846-70) will disclose that he then testified to the same controlling basic facts that he reiterated in the present case, namely: that the reorganization plan was a merger, not a sale, under which Maxi was solely obligated to issue $17,000 of its debenture bonds in compromise settlement of the claims of creditors (R. 855-56); that the reorganization plan embodied and carried out the tentative agreement reached on February 13, 1942 by the parties as a result of their negotiations in late January and early February 1942 (R. 846, 849, 850-52, 870); that at the time of the respondent's April 8, 1942 conference with Michael and Reifsnyder the latter two knew the fees which they were to receive and were dissatisfied (R. 861); that at the conference Michael and Reifsnyder asked that a separate check be drawn for $3,000, the amount by which the loose assets, inventory, etc., would exceed the sum required to be paid for administrative costs, fees and expenses (R.

856); that the respondent replied that it made no difference to his client (Maxi) or himself how and to whom the money was paid, provided Maxi paid no more than the amount it had agreed to pay (R. 856, 867); that Maxi had a definite ceiling above which it would not go (R. 868); that the top price which Maxi was willing to pay and had agreed to pay was not altered by the $3,000 payment (R. 856-57); and that the respondent knew that the $3,000 would come back to Michael and Reifsnyder, even though the check was drawn to Fenner's order (R. 860).

This prior testimony of the respondent in the contempt case does not contradict but corroborates his testimony in the present case and certainly does not establish an obligation on Maxi's part to pay $26,404.33 for the current net assets of Central Forging, as the Government mistakenly contends. On the contrary, this prior testimony corroborates the documentary evidence, the oral testimony of the respondent and even the reluctant admission by Michael on cross-examination (R. 182, 196-97) that the only obligation of Maxi, in addition to issuing $17,000 in debenture bonds to creditors in compromise settlement, was to pay administrative costs, as allowed by the District Court, not in excess of $26,404.33.

It is, indeed, a strange and ironical turn of events that the Government—having previously relied upon the voluntary testimony of the respondent in the Michael contempt proceeding, which testimony first disclosed that the $3,000 had been paid to Michael, and which enabled the prosecution to convict Michael of contemptuous perjury for having falsely testified before the Grand Jury that he had not received it—should reverse itself and now urge (a) that the respondent's version of the $3,000 transaction, which version has never changed and was testified to by the respondent in the contempt case as well as in the present case, was unbelievable and (b) that the testimony of Michael in this case, in which he admits for the first time in open court that he did actually receive the $3,000 but that thereupon he corruptly gave it to Donald Johnson (a story the jury rejected by acquitting the latter) was alone credible.

In addition to contending that the respondent's testimony regarding the $3,000 transaction was preposterous and incredible, the Government in its brief (pages 53-54) further claims that the respondent's testimony concerning the obligation of Maxi to pay only the expenses of the reorganization up to $26,404.33 was uncorroborated, contradicted his prior testimony in the contempt proceeding, was unsupported by the court orders and was disbelieved by the jury. This brief has already pointed out that the respondent's testimony about the $26,404.33 was admitted by Michael on two occasions during his cross-examination (R. 182, 196-97).

Although the defendant Fenner could not recall whether or not at the February 19, 1942 meeting at the respondent's office, which meeting was called as a result of the February 13, 1942 meeting in the same office between the respondent, Michael and Reifsnyder, the officials of Maxi (Fenner, Davis and Long) agreed to take over Central Forging and pay the administrative costs (R. 634), he nevertheless recalled that the new merger plan of reorganization was discussed (R. 629-30). Fenner further recalled that by March 11, 1942 he had obtained final figures in order to work out the financing of Maxi to carry out the take-over of Central Forging (R. 635-42). Fenner also admitted that he had been induced to act as intermediary in the $3,000 transaction by the plea of Reifsnyder that Michael and Reifsnyder wanted to get as much money as they could to take care of their families because Reifsnyder was going into the Navy and maybe Michael (R. 591-92, 672-73).

It thus appears that so far as Fenner could presently recall the negotiations he corroborated the testimony of respondent and contradicted the testimony of Michael.

There is nothing in the court orders to contradict the testimony of the respondent. On the contrary, such orders

corroborated the testimony of the respondent that under the reorganization plan Maxi was only obligated to issue $17,000 of its debenture bonds to creditors in compromise settlement of their claims. The fact that the trustee was ordered to pay in cash the reorganization costs and expenses accords with the documentary evidence and supports the defense version that at the request of Michael and Reifsnyder Maxi agreed to pay the costs and thus relieve the trustee of his obligation to liquidate sufficient assets to pay the same before transferring the remaining assets of Central Forging to Maxi in consummation of the merger and that by so agreeing Maxi received all the assets without any diminution.

No one knows why the jury acquitted Donald Johnson and Davis and convicted Fenner and the respondent. As Circuit Judge Maris pointed out in his opinion, the acquittal of Donald Johnson showed that the jury rejected the theory of the prosecution that the $3,000 transaction was part of a corrupt bargain between Michael, Reifsnyder and Donald Johnson and left only the charge that Michael "for the purposes of his own, appropriated $3,000 belonging to the estate" (R. 832). The only logical inference which can be drawn from the action of the jury is that Michael's testimony of a corrupt bargain with Donald Johnson was disbelieved. The Government's contention that the conviction of the respondent indicates that the jury refused to believe his testimony and therefore inferentially accepted at least a portion of Michael's testimony is unwarranted speculation.

3. *The $3,000 payment by Maxi to Michael individually was not part of and did not belong to the debtor's estate.*

The brief for petitioner claims that the $3,000 indirectly paid Michael came out of the agreed price of $26,404.33 for the accounts receivable and other loose assets of Central Forging, that this reduction in the purchase price was fraudulently concealed by a corresponding decrease in the accounts receivable from $23,404.33 to $20,404.33, and that the Court of Appeals erred in concluding that (a) the $3,000 belonged to Maxi, (b) was a purely voluntary payment out of its own funds, upon which the reorganized estate had no claim, and (c) did not constitute an embezzlement or unlawful transfer in violation of Section 29 (a) of the Bankruptcy Act (pages 63-71).

The errors of fact and law underlying this unsound claim are manifold and manifest. First, Maxi never agreed to pay $26,404.33 or any other cash sum for the accounts receivable and other loose assets of Central Forging. Its sole obligation was to pay $17,000 in debenture bonds to take care of creditors under the compromise, and in addition to pay in cash receivership and reorganization expenses, as allowed by the District Court to an amount not exceeding $26,404.33. That obligation was discharged in full (pp. 1, 14-24 ante).

The documentary evidence corroborates in every particular the uncontradicted testimony of respondent that the revised plan of reorganization was in fact and law a merger authorized by and effected under Chapter X of the Bankruptcy Act (R. 430-444, 449-452, 490-491, 495-501, 505-506). The plan did not value Central Forging's assets, because such a valuation was neither necessary nor material to reorganization by merger.

The use of the postulatory figure of $26,404.33 as a yardstick to measure the maximum amount of receivership and reorganization expenses that Maxi was obligated to pay arose in this way. An account had been stated as of December 31, 1941, which showed that if secured and unsecured creditors accepted $17,000 for their claims and Maxi waived its claim as the holder of $21,300 of Central Forging's bonds, the net value placed upon the assets passing through the hands of the trustee would in general approximate the $26,404.33 figure. Stockholders had no rights because of Central Forging's insolvency. The trustee consequently thought that he could properly ask the court to award for administration expenses a sum equal to what had passed through his hands.

Second, the $3,000 paid Michael came from Maxi's own treasury and never belonged to or formed a part of the debtor's estate. The prosecution proved that it came from Maxi's bank account (R. 103, 504). The indictment concedes that this $3,000 never came into Michael's charge as trustee. Not only does it expressly charge that it was paid to him "individually," but even emphasizes that it was paid to him "not as trustee" (R. 9).

The evidence negatived the existence of any cash in the debtor's estate on April 24, 1942. The Dobson Report as of December 31, 1941, as well as the report of the successor trustee of April 8, 1942, showed cash of $133.90 (R. 90-92, 161). The evidence further showed that no cash was turned over by the trustee to Maxi on April 24, 1942. This was to be expected, because Central Forging was an operating company that had to meet a current payroll. Reifsnyder's February 17, 1942 letter to the respondent (R. 715-718) disclosed that as of December 31, 1941 wages, salaries, etc. exceeded the then total of accounts receivable, assigned and unassigned, and the $133.90 cash on hand and in bank.

Patently, the $3,000 in cash could not possibly come from any alleged reduction in the accounts receivable. Equally obvious is the fact that a $3,000 reduction in the accounts receivable would not necessarily result in a corresponding increase in the cash position of Central Forging as the Government's brief fallaciously contends.

Thirdly, the evidence failed to show the existence of any accounts receivable at settlement for transfer to Maxi. The Court of Appeals noted (R. 836) this fatal omission in the Government's proof, when its opinion pointed out that "There is evidence that most, if not all, of those accounts receivable were collected between December 31, 1941 and April 24, 1942 and there is no evidence as to the amount of accounts receivable actually transferred to the Maxi Company on the latter date."

The prosecution's entire case rested upon the supposed existence of $23,534 of accounts receivable on April 24,

1942. When the prosecution failed to show that on April 24, 1942, any accounts receivable existed but did affirmatively prove that no accounts receivable were the subject of the bill of sale then delivered to Maxi, the Government's case was completely at an end. The charge was that $3,000 of accounts receivable were omitted from the records and unlawfully transferred on April 24, 1942. The burden was on the Government to prove this charge. That burden was never met.

The Government's own witness testified that he had a firm of certified public accountants audit the books of the debtor estate every month (R. 87). Thus the Government was in a position to show if any accounts receivable were in existence on April 24, 1942. The Dobson audit as of December 31, 1941, which the Government offered in evidence (R. 87-89), listed $23,534 of accounts receivable as then existent, of which $12,283.67 had been assigned to the bank. Inasmuch as all the assets of Central Forging were awarded to Maxi under the reorganization merger, any unpledged accounts receivable existing at the transfer date of April 24, 1942 should have been included in the bill of sale.

The prosecution attempted to show that from the accounts receivable as of December 31, 1941, in the aggregate amount of $23,534, the bookkeeping figure of $3,000 was to be deducted, thus leaving the suppositive figure of $20,534 as the accounts receivable to be transferred under the final decree of confirmation of the designated plan of reorganization by the trustee to Maxi (R. 80-83). In contradiction thereof, the testimony of the Government affirmatively showed that out of the listed $23,534 of accounts receivable as of December 31, 1941, accounts receivable in the amount of at least $12,283.67 had already been assigned to the Catawissa National Bank, so that at that time there remained only the conjectural $10,251 of accounts receivable as the property of the debtor estate that could possibly be transferred by its trustee to Maxi in accordance with the final decree of confirmation (R. 160-163, 169).

The proofs admittedly showed that included in the accounts receivable of $23,534 as of December 31, 1941, was an account of Maxi in the sum of $3,086 which was paid on January 26, 1942, by check of Maxi to the debtor, thereby necessarily reducing the accounts receivable to $20,448 (R. 163, 169-171, 473-474, 549-550). This was substantially the amount set forth in the trustee's report of April 14, 1942 (R. 90-92).

The Government sought to create the conjectural impression that the $23,534 of accounts receivable existent as of December 31, 1941, and the $3,000 payment by Maxi would appear as cash at the settlement on April 24, 1942, or else would appear in the form of new accounts receivable (R. 197-198). This is the purest conjecture. Moreover, the Government's own witness stated that the $3,000 was at most a theoretical bookkeeping figure (R. 93-94, 199).

Fourthly, Government counsel who was also at the trial, freely admitted at the oral argument before the Court of Appeals that there was no proof of the existence of accounts receivable and other loose assets in the sum of $26,404.33 at the time of settlement under the reorganization plan. The following colloquy between Circuit Judge Maris and Government counsel at the oral argument contains the admission that there were not $26,404.33 of book accounts and book assets for transfer on April 24, 1942 (Certified Transcript p. 62):

> "Judge Maris: Well, it is perfectly obvious that there were not $26,404 worth of assets at that time in that form. You, of course, concede that?
>
> "Mr. Brooks: That is correct.
>
> "Judge Maris: That is a figure that has been agreed upon.
>
> "Mr. Brooks: Reasonably, yes.
>
> "Judge Maris: They would take what there was there, and that was the limit they had put.
>
> "Mr. Brooks: That is right.

"Judge Maris: It might be more, it might be less, depending upon the course of the transactions of the trustee in the meantime, the way he carried on the business, whether he lost or gained."

Fifthly, Government trial counsel also conceded at the oral argument that Maxi alone owned and had any right in the $3,000 paid Michael. Counsel for respondent had previously pointed out that the only obligation of Maxi was to pay the $23,404.33, the sum actually allowed by the District Court for receivership and reorganization expenses, that Maxi's obligation to pay expenses not exceeding $26,404.33 was conditioned upon their specific allowance by the District Court, and that, therefore, had Maxi paid the maximum amount, the $3,000 difference between it and the allowed $23,404.33 would have been turned back to Maxi as a part of Central Forging's assets. In other words, if the District Court had allowed but $10,000 for expenses, Maxi would have been obligated to pay that sum and no more (Certified Transcript pp. 10-16).

In reply thereto, Government trial counsel admitted to Circuit Judge Maris that the $3,000 paid Michael belonged to Maxi and that if Maxi had paid the maximum amount of $26,404.33 the $3,000 excess would have gone to Maxi together with all the other assets of Central Forging (Certified Transcript pp. 65-67):

"Judge Maris: It seems to me that the great hurdle you have to get over is that this plan admittedly, of course, from your standpoint, provided for all the creditors in a certain fixed amount. They were to get so much in the way of percentage on their claims; the stockholders got nothing.

"Mr. Brooks: Correct.

"Judge Maris: So there was nobody else interested except the purchaser and the officers of the court who were looking to fees and were entitled to fees in some instances.

"Mr. Brooks: That is right.

• • •

"Judge Maris: Suppose they had $26,000, and Judge Johnson cutting allowances everywhere said, 'I will only give you $23,000; that is enough for you'—what would have happened to the $3,000?

"Mr. Brooks: I think personally it would have gone with all the other assets to Maxi.

"Judge Maris: In other words, they would pay far more than they were required to Maxi.

"Mr. Brooks: That is right. That is the way I look at it.

"Judge Maris: Well, isn't that the theory? You are both in accord on that. That is just what Mr. McCracken argues. He says that they were just obligated to pay whatever the allowances were.

"Mr. Brooks: Well, that was the defense that the appellant offered at the time.

"Judge Maris: I know, but taking the defense or not, just on the facts as you understand them, what else, who else, would have had a claim on this $3,000? Who could have gotten the money? Assuming that it was not taken out as you charge here, it certainly was taken out in a secret sort of way and by roundabout circulation—no doubt about that—is there anybody else who could come forward and say 'Well, my money was taken here'?

"Mr. Brooks: No, Your Honor, because everybody was settled with, and I think it would have gone to Maxi like all the other assets. I cannot see any other way.

"Judge Maris: I was wondering about that myself, and that being so, it is pretty hard to see where the Bankruptcy Act or the bankruptcy administration was involved."

The consequences of these two frank admissions by Government counsel (based as they were explicitly upon the evidence in the case), are far reaching. They negative irrevocably the oft repeated charge in the petition that $3,000 of the assets of the debtor's estate were embezzled and dissipated. They render moot any discussion of the scope and intent of Section 29 (a) of the Bankruptcy Act. They deny any right of possession in the trustee to the $3,000 paid Michael individually by Maxi. They corroborated the position of respondent that the $3,000 belonged to Maxi, and that its payment by Maxi to Michael was voluntary.

The foregoing admissions of Government trial counsel to the Court of Appeals are binding and may not be repudiated in this Court by new Government counsel, who did not participate in the trial. See *O. F. Nelson & Co. v. United States*, 149 F. (2d) 692 (1945) (C. C. A. 9) at pages 694-695.

Sixthly, the District Court in limiting receivership and reorganization expenses to $23,404.33 in its order of April 24, 1942 (R. 92-97) did not rely upon and was not misled by the suppositive bookkeeping figure for the accounts receivable, as Government counsel conjecturally assert and the Court of Appeals erroneously assumed (R. 835). On the contrary, the evidence is uncontradicted that prior to the filing on April 14, 1942, of the "Report of Successor Trustee" (R. 90-92), Michael and Reifsnyder called on respondent at his Sunbury office on April 8, 1942. Reifsnyder stated that he had been present at a meeting in the office of Special Master Crolly at which fees were generally talked over; that from that conversation and other information he had he knew that fees, costs and allowances would be, as near as he could calculate, about $3,000 less than the maximum which Maxi had agreed to pay; and that Michael and he would have to take less money for their fees than they had expected to receive (R. 462-463, 563-564; 8).

Anent this Report, it should be noted that respondent had nothing to do with its preparation (R. 493). He had no reason to expect such a report would be filed, as Chapter X did not require it (R. 542). He did not see the Report until three months later (R. 493).

Finally, in reviewing the foregoing proofs, the majority opinion correctly observed (R. 833-34; 835; 836):

"On April 8, 1942 Reifsnyder and Michael called upon Knight and informed him that they desired to secure $3,000 in addition to the allowances which the District Court would make to them . . . It was evidently thought, and rightly so, as events turned out, that the court would limit the allowances to the figure thus reported, in which case the Maxi Company would be able to pay Michael the $3,000 requested by him without exceeding the total amount which it had originally agreed to pay. . . .

* * *

"The question for decision is whether these facts support the charges made in the indictment that Michael appropriated to his own use $3,000 of funds belonging to the estate of the Forging Company and that in connection therewith he unlawfully transferred $3,000 of accounts receivable of the Forging Company to the Maxi Company. We think the answer must be in the negative. . . .

* * *

"* * * But since the court did not in fact make allowances in excess of $23,404.33, the Maxi Company's obligation under the plan to pay the expenses was limited to that amount and its payment to Michael through Fenner of an additional $3,000 was a purely voluntary payment out of its own funds of a sum upon which the estate of the Forging Company had no claim.

"What has been said applies equally to the charge in the second count of the indictment that $3,000 of

accounts receivable were transferred without consideration. The fact is, as we have already pointed out, that the figure in question involved the amount of accounts receivable on December 31, 1941. There is evidence that most, if not all, of those accounts receivable were collected between December 31, 1941 and April 24, 1942 and there is no evidence as to the amount of accounts receivable actually transferred to the Maxi Company on the latter date. But whatever they were, the Maxi Company was entitled under the plan of reorganization to receive them and it did receive them along with all the other assets of the Forging Company. The sole consideration under the plan which the Maxi Company was obligated to pay for all of the assets of the Forging Company which it received, including the accounts receivable, was the issuance by it to the creditors of the Forging Company of its debenture bonds in the sum of $17,000 and its payment of the expenses of administration as allowed by the district court. We have seen that this consideration was paid in full by the Maxi Company."

B. Petitioner's Unsound Secondary Contentions.

Most, if not all, of the numerous arguments advanced by petitioner as reasons for reversing the Court of Appeals (pages 49-71) are founded upon the three basic misconceptions of fact and law above discussed and answered (pp. 13-33 ante).

1. *Maxi's voluntary payment to Michael of the additional $3,000 out of its own funds did not and could not lessen the amount available for distribution to creditors of Central Forging.*

Government counsel in the trial court and to the jury argued that but for the $3,000 payment there would have been much more money for creditors and "perhaps for the poor stockholders" (R. 745). During the oral argument in the Court of Appeals, they abandoned this contention

and admitted that Maxi would have alone been entitled to the $3,000 because Central Forging's insolvency barred stockholders from participating in the reorganization, and because the creditors of Central Forging had accepted a compromise settlement of their claims (pp. 28-30 ante).

They now repudiate this admission. They conjure up three hypothetical claimants who, they allege, would have had a higher claim than Maxi to the $3,000 if that sum had been paid into the debtor's estate, and who were therefore injured by its payment to Michael individually.

The first supposed claimant is the debtor's estate under the theory that the $3,000 was "trust property" (pages 60-61, 64-65). This claim is but another manifestation of the basic misconceptions that Maxi agreed to pay and actually paid $26,404.33 for the accounts receivable and other loose assets of Central Forging, and that the $3,000 payment was in fact a part of the purchase price and belonged to the debtor's estate.

The second proposed claimant is entirely conjectural (pages 65-66). Government counsel presume that because Judge Johnson utilized the entire $23,404.33 he must have been misled into believing that this sum was all there was available for the payment of administration expenses. From this presumption they argue that it is unrealistic to ignore the probability that some of the recipients of fees would have been granted greater allowances if the court had known of the $3,000.

This presumption on a presumption is sheer speculation. There is not a scintilla of evidence to warrant either the presumption that Judge Johnson was misled or the further presumption that he probably would have awarded larger fees to some recipients if he had been told of the $3,000 and its alleged availability for distribution. The fact that Government counsel do not hazard a guess regarding the identity of this second supposed claimant and do not attempt to explain why and how he would be entitled to a greater fee is cogent proof that he is but a figment of their imagination.

Moreover, these two speculative presumptions pay no heed to the facts as proved. Prior to April 8, 1942, the date when Michael and Reifsnyder first proposed the $3,000 payment to respondent, the question of fees, costs and allowances had already been generally discussed with the Special Master. From this discussion and other information they had, they then knew that such fees, costs and allowances would be about $3,000 less than the maximum figure of $26,404.33 which Maxi had agreed to pay if allowed by the District Court (R. 462-63; 563-64; 861). The accuracy of their information is confirmed by the limitation subsequently placed upon fees, costs and allowances by the order of Judge Johnson handed down on April 20, 1942 (R. 92-97).

The third supposed claimant is creditors as a class (pages 64, 66-69). Although forced to concede that their acceptance of the plan of reorganization antedated the $3,000 transaction and was irrevocable for all ordinary purposes, yet the Government would emasculate this admission and gain verisimilitude for such a claim by arguing that creditors should not be placed in a less advantageous position than "plunderers of the estate and their abettors", and by hinting that dissenting creditors were surely to be preferred.

This sudden eleventh hour solicitude of the Government for creditors is indeed surprising. Their rights were fixed prior to the inception of the $3,000 transaction. The adequacy of their voluntary bargain has never been challenged. They have received the full consideration for which they contracted. That consideration was substantially enhanced by Maxi's waiver of any claim for the $21,300 of Central Forging bonds it held. There is no just ground for granting them any further advantage, particularly as that would be at the expense of Maxi, whose role has been solely that of a "benefactor", not a "plunderer".

This hypothetical claim, which springs from the basic misconception that the $3,000 belonged to the debtor's estate and was available for distribution, is without merit. When each creditor received and cashed Maxi debenture bonds in compromise settlement of the Central Forging debt he held, he was thereafter estopped from asserting any further claim against it, unless and until that compromise had been set aside for cause. There is no evidence of any dissatisfaction on his part with such compromise and no proof that any creditor was in any manner misled to his damage. A pro rata distributive award of the $3,000 to creditors would be violative of the voluntary settlement they made of their claims.

The Government seeks to distinguish between consenting and dissenting creditors and to place the latter at least in a preferred class. Regardless of whether he formally consented to or disagreed with the plan of reorganization, each creditor was placed on the same estoppel basis by not filing exceptions and by accepting payment thereunder. Furthermore, the number of dissenting creditors is de minimis. Out of 36 bondholders, 34 voted in favor of the reorganization and 2 against it (R. 456-57). No general creditor voted against it. Why the two dissented does not appear. Nevertheless, they did not press their dissent but participated in the compromise settlement.

2. *The defense testimony regarding the circumstances and reasons for Maxi's voluntary payment of $3,000 from its own funds to the successor trustee, Michael, was alone credible.*

The Government's brief attacks (pages 71-73) the defense version of the $3,000 payment (R. 463-68; 563-64; 569) as "incredible" and insists that Michael's testimony in regard thereto was "candid, consistent and documented". When the jury acquitted Donald Johnson, they necessarily resolved the issue of comparative credibility against

Michael. They refused to believe his testimony that the purpose underlying the $3,000 payment was corrupt, i. e., to provide funds to take care of Donald Johnson for having procured the appointments of the successor trustee and his attorney.

The real basis for the prosecution's attack upon the reliability of the defense explanation of the $3,000 payment is once again the misconception that this sum formed a part of the consideration actually paid for the assets of Central Forging, and was arbitrarily and secretly deducted therefrom to the detriment of the debtor's estate and its creditors. Through the instrumentality of this misconception, the Government hopes to establish at least a technical embezzlement and unlawful transfer of assets of a debtor's estate in reorganization, even though that embezzlement and unlawful transfer apparently benefited no one of the accused and was without purpose. Michael had testified as a Government witness that he had never personally shared in or benefited from the $3,000 payment. Certainly respondent did not. Unless the defense explanation of the transaction is accepted, the action of Michael is inexplicable and meaningless.

The Government's brief asserts that the defense version of the $3,000 payment does not accord with the facts and is incredible because business concerns just do not make gifts in this fashion to individuals (page 72). This brief has already reviewed (pp. 24-33 ante) the evidence which proves beyond peradventure that the additional $3,000 was a purely voluntary payment by Maxi out of its own funds of a sum upon which the debtor's estate had no claim. There is no proof whatever of what was the practice of other business concerns in such matters.

The only trustworthy evidence of the purpose of the $3,000 payment was that offered by the defense, namely, a proper and honest desire to reward men preparing to enter their country's service for work well and promptly done. Whether rightly or not, these men felt they were entitled to

more compensation for their services than allowed by the court and successfully appealed to Maxi for more generous treatment. The latter's generosity is in keeping with its earlier liberality in waiving any claim for the $21,300 bonds of Central Forging that it owned.

The fundamental issue, however, is who owned the $3,000 and not why it was paid. The Court of Appeals held that the evidence conclusively showed it belonged to Maxi and formed no part of the debtor's estate (R. 835). The inevitable conclusion from this finding had to be that the prosecution had failed to prove the charges made in the indictment (R. 836). But the fact that the Government's proofs failed to show both a corrupt purpose for and a beneficiary of the alleged embezzlement should not be forgotten, since it re-emphasizes the failure of the prosecution to sustain the indictment charge of a deliberate and concerted defrauding of the debtor's estate in reorganization.

3. *The decision of the Court of Appeals does not condone, encourage or allow an embezzlement or misappropriation of funds from a debtor's estate in reorganization.*

The closing contention of the Government (pages 73-74) that the decision of the Court of Appeals establishes an easy means of embezzling from bankrupt estates and sets a harmful precedent arises from an inexplicable misconstruction of the majority opinion. Circuit Judge Maris unequivocally stated that the sole question before the appellate court was whether or not respondent aided and abetted Michael to violate Section 29 (a) of the Bankruptcy Act, in the manner described in the indictment (R. 835). He answered this question in the negative, when he concluded that the $3,000 "was a purely voluntary payment out of its (Maxi's) own funds of a sum upon which the estate of the Forging Company had no claim" (R. 835) and that consequently the evidence did not support "the

charges made in the indictment that Michael appropriated to his own use $3,000 of funds belonging to the estate of the Forging Company and that in connection therewith he unlawfully transferred $3,000 of accounts receivable of the Forging Company to the Maxi Company" (R. 834-35). The majority opinion may not conceivably be distorted into a precedent permitting embezzlement and misappropriation from a bankruptcy estate or condoning any violation of Section 29 (a).

C. Conclusion.

For the several reasons above stated, it is respectfully submitted that the Court of Appeals correctly concluded that the evidence did not support the charges of the indictment and that consequently the motion of respondent for a directed verdict of acquittal should have been granted. Petitioner has failed to show any error in that conclusion.

It is further respectfully submitted that the only miscarriage of justice in the present case was the conviction of respondent on the charge of abetting the trustee, Michael, in embezzling property of the debtor's estate and conspiring to do so. At the oral argument before the Court of Appeals, Government trial counsel professed an inability to reconcile the acquittal of Donald Johnson, against whom the prosecution was primarily directed, with the conviction of respondent (Certified Transcript pp. 57-59). And yet the Government now refuses to recognize that the bottom dropped out of the present case when the jury rejected the basic theory of the prosecution and acquitted Donald Johnson, whom they claimed was the sole author of and beneficiary under the alleged conspiracy to embezzle and misappropriate.

Finally, it is also respectfully submitted that the majority opinion in nowise condones, permits or fosters an embezzlement or misappropriation of funds of a

debtor's estate in reorganization. Nor may that opinion be misconstrued in the manner petitioner suggests in an effort to distort it into a harmful precedent, inviting covinous and conspiratory violations of Section 29 (a) of the Bankruptcy Act.

Respectfully submitted,

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